(1)

No. _____ 011225 FEB 19 2002

In The

Supreme Court of the United States

MEXICAN AMERICAN LEGISLATIVE CAUCUS – TEXAS HOUSE OF REPRESENTATIVES,

Appellant,

v.

STATE OF TEXAS, et al.,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas (Three Judge Court)

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Where minority plaintiffs present uncontroverted evidence of: (1) Hispanic voter cohesion in primary and general elections; (2) Anglo bloc voting that usually defeats the Hispanic preferred candidate absent Hispanic majority districts; and (3) additional majority Hispanic citizen voting age population districts beyond those contained in the challenged plan; and where in the totality of circumstances minority plaintiffs present uncontroverted evidence of historical discrimination, continuing adverse effects of historical discrimination, lack of Hispanic proportional representation, and a paucity of Hispanic elected officials absent Hispanic majority districts, may a court, without explanation, ignore such evidence in reaching the conclusion that plaintiffs have failed in their burden under Section 2 of the Voting Rights Act?

2. Once a Section 5 objection is interposed to a statewide redistricting plan, is it proper for the district court to order that plan into effect without addressing all the objections raised by the United States Attorney General?

3. Is Section 5 preclearance required when a district court adopts as its final plan virtually all of the state's redistricting plan?

PARTIES TO THE PROCEEDINGS

Plaintiffs

Simon Balderas, Gilberto Z. Torres, Brian Manley, Frank D. Sandoval, Jr., Eugene Pack, Honorable Tom Delay, Honorable Joe Barton, Honorable John Culberson, Associated Republicans, John Denoyells, Morris Overstreet, Boyce T. Breedlove, David Brown, David O. Zambrano, Joy Smith, Vivian Harris, Tony Campos, Ed Gonzales, Margaret P. Rodriguez, Michael Moon, Don Pedroza, Pauline Dixon, Rafael Quintanilla, Hargie Faye Savoy, Ralph McCloud, Dianna Villasana, Gina Dixon, Alex Vidales, Sr., George Rios, Roy Stanley, Phyllis Cottle, Dorothy M. Lee, Molly Woods, Texas League of United Latin American Citizens, J. B. Mayfield, Ledbetter Neighborhood Association, Williamson County, Texas, Texas Farm Bureau Mutual Insurance Company, Roy Miller, Bonnie Breazeale, Bennie Escobar, Denise Escobar, William R. Leo, Jesse Diaz, Congresswoman Eddie Bernice Johnson, Stephen Leroy Honore, Henry Martinez, Atascosa County, Texas, Bell County, Texas, Grayson County, Texas, Johnson County, Texas, Wichita County, Texas, Texas State Conference of NAACP Branches, Texas Coalition of Black Democrats, Art Murillo, Charles E. Vinn, Sr., Juanita Valdez-Cox, Leo Montalvo, Rolando Arriola, Emily Amps, Louis Laster, Terry Meza, Latino and African-American Voters, Residents of Tarrant County Texas, Congressman Kevin Brady, Congressman Sam Johnson, Gene Green, Sheila Jackson Lee, Nicholas Lampson, Lester Bellow, Homer C. Guillory, Willie Davis, John Bland, Mexican American Legislative Caucus, Texas House of Representatives, Guy C. Jackson, John Archer, Howard County, Texas, Phil Sudan, Congressman Ken Bentsen, The Texas Legislative Black Caucus

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Defendants

State of Texas, Rick Perry-Governor of Texas, James "Pete" Laney, Speaker of the Texas House of Representatives, Henry Cuellar, Secretary of State of Texas, Susan Weddington, Chair of the Texas Republican Party, Molly Beth Malcom, Chair of the Texas Democratic Party, William Owens, Jr., Bill Ratliff, Lieutenant-Governor of Texas, John Cornyn, Attorney General of Texas, Carol Keeton Rylander, Comptroller of Public Accounts of Texas, David Dewhurst, Texas Land Commissioner, Geoffrey S. Conner

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The opinions and orders of the district court are not yet reported. They are reproduced in the attached Appendix. They consist of the per curiam opinion and judgment of the three-judge court (App. A); the concurring opinion of John Hannah, Jr., District Judge (App. B); and the amended judgment of the three-judge court. (App. C).

JURISDICTION

This action challenged the redistricting plan for the Texas House of Representatives and the Texas Senate adopted by the State of Texas through the Legislative Redistricting Board and sought the adoption of a redistricting plan for the Texas delegation to the United States House of Representatives. This appeal concerns only the redistricting plan for the Texas House of Representatives. Jurisdiction of the three-judge district court was invoked under 28 U.S.C. § 1343, and 42 U.S.C. § 1973c. The opinion and judgment of the three-judge district court for the Eastern District of Texas were entered on November 28, 2001. Notice of appeal was filed on December 20, 2001. The judgment was amended only as to the Senate portion of the case on January 18, 2002, and an amended notice of appeal was filed on February 7, 2002.

This appeal is being docketed in this Court within sixty days after the filing of the notice of appeal in the district court. Jurisdiction of this Court is invoked under 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

STATUTORY PROVISIONS

The statutory provisions involved in this case are Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973 and 1973c. The texts of these provisions are reprinted in the appendix (App. 22 and 23).

STATEMENT OF THE CASE

Appellant is the Mexican American Legislative Caucus, Texas House of Representatives (MALC). This action was filed on April 12, 2001, raising claims under the Voting Rights Act of 1965, § 2, Article I of the United States Constitution and the Fourteenth Amendment to the United States Constitution (Docket #1). On June 5, 2001 the order constituting the three-judge court to hear this case was entered (Docket #12).

The Texas Legislature adjourned in May, 2001 without enacting any legislative redistricting plans (App. 5). Therefore, pursuant to Section 28, Article III of the Texas Constitution, the Legislative Redistricting Board (LRB) convened and on July 24, 2001, enacted a redistricting plan for the Texas House of Representatives (App. 5).

On August 7, 2001, appellant filed a Motion to Intervene as a party plaintiff and a Complaint in Intervention challenging the redistricting plan adopted by the LRB for the Texas House of Representatives (Plan 01289H) as violative.of §§ 2 & 5, of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 & 1973c, and the Fourteenth Amendment of the United States Constitution (Docket #38). On

August 29, 2001, the court granted the Appellant's Motion to Intervene (Docket #56).

The plan adopted by the LRB for election of members of the Texas House of Representatives was submitted to the United States Department of Justice (DOJ) pursuant to Section 5 of the Voting Rights Act on or about August 16, 2001 (App. 3). On October 12, 2001, the DOJ, pursuant to 28 C.F.R. § 51.39, extended the Section 5 review period for an additional sixty days in order to review additional material submitted by the Texas Attorney General (MALC Exhibit No. 44). On November 16, 2001, the DOJ issued a letter of objection rejecting the LRB'S redistricting plan as a retrogression of Mexican American voting strength (App. 5, 9). In refusing to preclear the LRB plan, the DOJ first objected to the entire plan (" . . . I must object to the 2001 redistricting plan for the Texas House of Representatives.") (App. 26). Second, the letter of objection specified the retrogression in districts in South Texas, Bexar County, and West Texas, but did so in conjunction with adjoining districts implicating additional districts (App. 29-31). Third, the DOJ assessed its review of retrogression on a state-wide basis allowing that the potential cure could be done anywhere in the State (App. 29). Fourth, the letter included in its assessment the net reduction of two Spanish surnamed registration majority districts. *Id.* The LRB plan reduced four current majority Spanish surnamed registration districts to below 50% Spanish surnamed registration (districts 44, 74, 104 and 115), while increasing Spanish surnamed registration above 50% in only two districts (districts 31 and 80) (MALC exhibit no. 30). This obviously represents a net loss of two majority Spanish surnamed registration districts as noted in DOJ's

letter of objection (App. 29). The districts in the LRB plan reduced from majority Spanish surnamed registration districts to below majority are Districts 44 (in South Texas), 74 (in the west Texas border area), 115 (in Bexar County), and 104 (in Dallas County) (MALC exhibit 30). Therefore, Dallas County, Bexar County, the border area in west Texas and the South Texas area around District 44 were implicated in the retrogression problem noted by the DOJ (App. 29; MALC Exhibit No. 30). The DOJ also described as a retrogression the reduction of minority population in two districts to the point that the minority population in those districts can no longer elect candidates of choice (App. 30-31) (districts 38 and 35 and their adjoining districts). For instance, with regard to South Texas District 35, the letter of objection noted that dropping the Spanish surnamed voter registration from 55.6% to 50.2%, and the Hispanic voting age population from 57.8% to 52.1%, while maintaining the adjacent district at over 90% Spanish surnamed registration, was a retrogression because the reduction unnecessarily eliminated District 35 as a district in which Hispanic voters could elect candidates of their choice (App. 30-31). Finally, the letter also determined that "overall the State fragments the core of majority Hispanic districts **in this area**, thus affecting member-constituent relations and existing communities of interest in these districts at a disproportionately higher rate." (App. 31-32, emphasis added).

Trial was held as to the Texas House of Representatives from November 13, 2001 through November 15,

2001[1] (App. 3). On November 28, 2001 the district court entered its memorandum opinion and judgment adopting its remedy redistricting plan for the Texas House of Representatives (App. 1). Although the LRB plan failed to secure preclearance as required by Section 5 of the Voting Rights Act, and therefore, was unenforceable as a matter of law, the district court nevertheless attempted to address the federal statutory and constitutional claims raised by the parties challenging the LRB plan. Although not entirely clear, the district court seemed to group together the plaintiffs that challenged the LRB plan for dilution of Hispanic voting strength together as the "Balderas plaintiffs," those that challenged the LRB plan as a dilution of African-American voting strength as the "Amps intervernors," and allowed Speaker Laney, a defendant in this action, to speak for all other challengers (App. 7-8).

With regard to the plaintiffs' Section 2 claims challenging the LRB plan for violating Hispanic voting strength, the plaintiffs submitted hundreds of exhibits and days of lay and expert testimony on the *Thornburg v. Gingles*, 478 U.S. 30 (1986) threshold factors and on the totality of circumstances required to show a vote dilution claim. Evidence on racial bloc voting was presented by authorities including: Dr. Alan Lichtman; Dr. Richard

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[1] The district court severed the case into three parts. The court held trials on the Congressional redistricting and the Senate redistricting in the weeks immediately preceding the trial on the Texas House of Representatives, although it utilized the record developed in the Congressional case to decide the issues in the Senate and Texas House portions of the case (Docket #412).

Engstrom; and Dr. Richard Murray. Evidence on the number of majority Hispanic citizen voting age population (HCVAP) districts in each of the plans was presented by Dr. William Kelly. Dr. Kelly's analysis revealed that the plans submitted by appellant and other plaintiffs contained more HCVAP districts than the LRB plan (Mayfield Exhibit 14). A number of Hispanic legislators, including Representative Pete Gallego, the chairman of the Mexican American Legislative Caucus, testified concerning the impact of the LRB plan on Hispanic voters. Evidence on the totality of circumstances, such as the history of discrimination in voting against Hispanic Texans and its continuing effects, lack of proportional representation, the paucity of Hispanic officials elected from non-majority Hispanic districts, and how Hispanic communities were affected by the districts as drawn in the LRB's plan was presented to the district court. Yet, the sum total of the court's conclusive determination, without any analysis of the evidence, was:

> Looking first to the Balderas plaintiffs' claims, we find that the Latino population is not sufficiently compact or numerous to support additional Latino districts. We also find, under the totality of circumstances, the failure to create additional Latino majority districts will not prevent full and equal Latino participation in the political process. Indeed, the creating of additional districts beyond those in our adopted plan would risk giving rise to retrogression in existing Latino majority districts. We conclude that the Balderas plaintiffs have failed to prove that Section 2 of the Voting Rights Act requires the creation of additional Latino districts based upon allegations of Latino vote dilution.

(App. 7-8). With that, the court rejected the plaintiffs' claims of Hispanic voter dilution and, except for minor modifications aimed at addressing the letter of objection, adopted the LRB's redistricting plan.

With regard to the Section 5 claim, the district court took DOJ's broad objection to the LRB's plan and applied a narrow, limited modification. Only with regard to Bexar County, Cameron County, and District 74, did the court actually make modifications independent of the State's plan (Docket #458, Plan 1369H). In over 90% of its remedy plan, the court either adopted the objected to LRB plan or incorporated the State's proposed modification of the LRB plan. *Id.* For example, the court adopted the State's proposed modification for district 35 and the surrounding districts (Docket #449, Plan 01368H) in developing its remedy plan. Finally, the court asserted that while the remedy plan "unavoidably bears some resemblance to plans submitted by the parties in certain areas, it is entirely of our own making. Therefore it is not subject to the preclearance requirements of Section 5 of the Voting Rights Act." (App. 9).

On November 30, 2001, the Honorable John Hannah, Jr. filed his concurring opinion (App. 12). On December 20, 2001, appellant filed its notice of appeal (App. 18). On January 18, 2001, the court entered its amended judgment, amending its judgment as to the Senate portion of the case only (App. 18). Appellant then filed its amended notice of appeal on February 7, 2002 (App. 20).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case presents at least three substantial questions concerning the application of Sections 2 and 5 of the Voting Rights Act. First, the district court applied a standard for evaluating a Section 2 claim that is inconsistent with this Court's rulings as well as with the rulings of all the courts of appeal. The district court determined that the plaintiffs failed to show that "the Latino population is sufficiently compact or numerous to support additional Latino districts." (App. 7). Yet, the uncontroverted evidence showed that a number of plans submitted to the district court, including the plan submitted by appellant, had more majority Hispanic citizen voting age population districts than did the challenged plan (MALC Exhibits 24, 26, 30, 33). The district court's conclusive determination ignores the first *Gingles* threshold standard that has been used by this Court and by the courts of appeal.

Second, the district court's decision is at odds with this Court's rulings in *Allen v. Board of Elections*, 393 U.S. 544 (1969), and all subsequent cases holding that a voting change in a Section 5 covered jurisdiction may not be enforced unless the state receives preclearance, either from the United States District Court for the District of Columbia or the United States Attorney General.[2] The district court erroneously relied on the limited exception to this rule carved out in *Upham v. Seamon*, 456 U.S. 37 (1982), and ordered the implementation of an

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[2] E.g., *Clark v. Roemer*, 500 U.S. 646 (1991); *United States v. Board of Supervisors of Warren County*, 429 U.S. 642; *Connor v. Waller*, 421 U.S. 656 (1975) (*per curiam*); Section 5 Procedures, 28 C.F.R. § 51.49.

unprecleared redistricting plan by making modest and minimal modifications to address broad, far-reaching objections to the unprecleared plan. The district court thereby substituted its judgment for that of the United States Attorney General and/or the United States District Court for the District of Columbia.

Finally, the district court incorporated the State's suggested modifications in its remedy and determined, contrary to this Court's pronouncements in *McDaniel v. Sanchez*, 452 U.S. 130 (1981), and its progeny, that in spite of the similarity to the State's plan, preclearance would not be required.

I. The District Court's Section 2 Analysis of the First *Gingles* Threshold Precondition and of the Totality of Circumstances Is Inconsistent with the Decisions of this Court and of the Courts of Appeal and Fails to Comport With the Requirements of Rule 54, of the Federal Rules of Civil Procedure.

The district court's determination on the voluminous Section 2 evidence regarding Hispanic voter dilution presented by the plaintiffs and the defendants in this action was reduced to a single paragraph that generally concluded that "the Latino population is not sufficiently compact or numerous to support additional Latino district" and that to create additional Latino districts would cause a retrogression of existing districts (App. 7-8). The district court's ruling is not only inconsistent with the record of this case, it is also in conflict with rulings of this Court and of the courts of appeal.

A. Section 2 Standards

Congress amended Section 2 of the Voting Rights Act in 1982 "to clearly establish the standards . . . for proving a violation of that section." S. Rep. No. 471, 97th Cong., 2nd Sess., at 2 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 178 [hereinafter S.Rep.]. Congress intended to "make clear that proof of discriminatory intent is not required to establish a violation of Section 2." S.Rep. at 2. Under this framework, a plaintiff can prevail "by showing that a challenged election law or procedure, in the context of the total circumstance of the local process, ha[s] the result of denying a racial or language minority an equal chance to participate in the electoral process." S. Rep. at 16.

This Court elaborated on the basic analytical framework established for evaluating a claim under Section 2 in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In *Gingles*, the Court provided some structure to the statute's "totality of circumstances" test in a case challenging North Carolina's multimember legislative districts. *Gingles*, 478 U.S. at 47.

The Court identified three threshold factors generally necessary to prove a Section 2 claim:

> Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group.

Gingles, 478 U.S. at 49 (emphasis in original).

The Court defined "geographically insular minority group" as a minority group that could comprise a majority in a single-member district. *Gingles*, 478 U.S. at 50. The Court explained that this factor was important to show

that the minority group had the potential to elect candidates of their choice absent the challenged structure. *Gingles*, 478 U.S. at 50 n.17. More recently, this Court has admonished trial courts against applying these factors in a mechanical fashion. *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993).

In the Fifth Circuit, a Hispanic plaintiff must show that Hispanics can comprise at least 50% of the voting age **citizen** population of a putative district in order to meet his burden on the first of the *Gingles* threshold factors. *Perez v. Pasadena I.S.D.*, 165 F.3d 368, 372-373 (5th Cir. 1999). To meet its burden, however, a Hispanic plaintiff may rely on a variety of evidence, such as evidence of super majority of the total population, evidence of minority voting age population of the district, minority registration data of the district, reliable evidence of Hispanic population growth in the area, and evidence of success by minority-preferred candidates in the area of the putative district. *Perez*, 165 F.3d at 373.

B. Hispanics are Sufficiently Large and Compact to Form a Majority in More Districts Than Under the LRB Plan

At trial, the appellant presented evidence that the LRB plan (plan 1289H) failed to create an adequate number of majority Hispanic Texas House of Representative districts when compared to the fairly drawn plan as submitted by appellant (plan 1323H). The plan submitted by appellant contained more Spanish surnamed registration majority districts than the State's plan (MALC Exhibits 25, 26, 27, 28, 29, 30, 33). The plan submitted by

appellant also had more Hispanic citizen voting age population majority districts than did any of the State's plans (MALC Exhibits 23, 24). Finally, the appellant's plan produced new and additional majority Hispanic citizen voting age population districts in South Texas (district 44), Dallas County (district 103) and Tarrant County (district 90) while maintaining the existing Hispanic majority districts. With regard to the LRB plan, not only did it have fewer Spanish surnamed registration majority districts and fewer majority Hispanic citizen voting age population districts than appellant's plan, it reduced existing majorities of Spanish surnamed registration in four districts (districts 115, 74, 104, and 44) while increasing only two existing districts (districts 80 and 31) to majority Spanish surnamed registration (MALC Exhibit 30). The LRB plan also reduced districts 35, 74, and 148 to below majority citizen voting age population (Mayfield Exhibit 14). The defendants presented no evidence to contradict the proposition that additional Hispanic districts were possible. Clearly, appellants met their burden under *Gingles I*. To find otherwise was inconsistent with the standards established by this Court for analysis of a Section 2 case.

C. Totality of Circumstances

The evidence important to a Section 2 totality of circumstances analysis was substantial. Plaintiff Balderas and others presented evidence of a history of discrimination that affected Hispanics' right to vote, and of a continuing effect of that discrimination (Testimony of Dr. J. Chapa, Rep. D. Garcia, Adelfa Callejo, Dr. A. Tijerina; MALC Exhibits 39, 40). This evidence was not seriously

contested. Appellant and others presented evidence of the dramatic growth of the Hispanic population in Dallas County, Tarrant County, Bexar County, Harris County, South Texas and in the State as a whole (Testimony of Rep. D. Garcia, Rep. P. Gallego; MALC Exhibit 37, 38). Appellant also presented evidence of lack of proportionality in representation for Hispanic voters and the paucity of Hispanic elected officials absent majority Hispanic districts (MALC Exhibits 23, 24, 31). Finally, there was no evidence that creation of additional Hispanic/Latino districts would cause a retrogression of existing Hispanic/Latino districts.[3] Nevertheless, the district court found that in the totality of circumstances, creating additional Latino districts would cause a retrogression of existing Latino districts (App. 8). Such a determination is inconsistent with the record and with the decisions of this Court.

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[3] The District Court may have been confused because such evidence was presented with regard to the Congressional portion of the case. However, Congressional districts are distinct from districts for the Texas House of Representatives. First, Texas has 150 State House of Representative districts compared to only 32 districts for the United States House of Representatives. Second, the population equality requirements for the congressional districts are stricter than for state legislative seats. Finally, Hispanic voters are closer to proportional representation in Texas Congressional districts than in State House of Representative districts. There simply is no evidence that creation of additional Hispanic Texas House of Representative districts will have a retrogressive effect on current Hispanic state house districts.

D. The District Court's Opinion and Judgment Fail to Articulate Rule 52a Findings of Fact and Conclusions of Law Sufficiently To Allow Analysis of Its Decision

Rule 52(a) of the Federal Rules of Civil Procedure requires that a district court "shall find the facts specially and state separately its conclusions of law thereon." As this Court has stated, "there comes a point where findings become so sparse and conclusory as to give no revelation of what the District Court's concept of the determining facts and legal standard may be." *Commissioner v. Duberstein*, 363 U.S. 278, 292 (1960). In a voting rights context, the courts of appeals have required that district courts exercise special care under Rule 52(a) and the district court's failure to exercise such care is itself grounds for reversal. The Fifth Circuit has required that district courts must "strictly adhere[ ] to the [Rule] 52(a) requirements" that they "find the facts specially" and must "explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning." *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1203 (1989) (quoting *Velasquez v. City of Abilene*, 725 F.2d 1017, 1020 (5th Cir. 1984)); *Clark v. Calhoun County, Miss.*, 21 F.3d 92, 97 (5th Cir. 1994). Other courts of appeal similarly "require a particularly definite record for voting rights cases." *Cousin v. McWherter*, 46 F.3d 568, 574 (6th Cir. 1995); accord *Johnson v. Hamrick*, 196 F.3d 1216, 1223 (11th Cir. 1999); *Lee County Branch of the NAACP v. City of Opelika*, 748 F.2d 1473, 1480 (11th Cir. 1984); *Harvell v. Ladd*, 958 F.2d 226, 229 (8th Cir. 1992); *Buckanaga v. Sisseton Indep. Sch. Dist.*, 804 F.2d 469, 472 (8th Cir. 1986); *Sanchez v. Colorado*, 97 F.3d 1303, 1316

(10th Cir. 1996). The "bedrock rule" that a district court's findings must be "sufficiently detailed to permit a reviewing court to ascertain the factual core of, and the legal foundation for, the rulings below . . . has particular force in cases of this genre." *Uno v. City of Holyoke*, 72 F.3d 973, 988 (1st Cir. 1995). That includes the requirement that "the district court must discuss 'not only the evidence that supports its decision but also all the substantial evidence contrary to its opinion.' " *Ibid.*; see also *Velasquez*, 725 F.2d at 1021 (remanding for district court, which wrote a "long and detailed" opinion, to "take note of substantial contrary evidence presented by the appellants"). It also includes the requirement that "when the statistics are the principal evidence offered . . . the district court must ensure that it thoroughly discusses its reasons for rejecting that evidence." *Clark v. Calhoun County*, 21 F.3d 92, 96 (5th Cir. 1994). Here the evidence regarding the ability to create more Hispanic majority citizenship districts was not seriously challenged. The evidence showed: the plan submitted by the appellant had 31 Hispanic citizen majority districts compared to only 28 such districts in the LRB plan (MALC Exhibit 24); the appellant's putative plan had 28 majority Spanish surnamed registration districts compared to only 25 in the LRB plan (MALC Exhibit 26); and that the plan submitted by appellant preserved the districts that currently elect Hispanics while the LRB plan eliminated some and retrogressed others (MALC exhibit 33). Yet, the district court, without explanation, found that "the Latino population is not sufficiently compact or numerous to support additional Latino districts." (App. 7). Not only is the District Court's opinion inconsistent with the record, its analysis

here is so sparse "as to give no revelation of what the District Court's concept of the determining facts and legal standard may be."

II. The District Court Improperly Ordered A Redistricting Plan That Retained Section 5 of the Voting Rights Act Objected To Features.

A jurisdiction subject to Section 5's preclearance requirement, such as the State of Texas, must obtain either judicial or administrative preclearance before implementing a voting change. *Lopez v. Monterrey County*, 519 U.S. 9, 20 (1996); *Clark v. Roemer*, 500 U.S. 646 (1991); *United States v. Board of Supervisors of Warren County*, 429 U.S. 642 (1977); *Connor v. Waller*, 421 U.S. 656 (1975) (*per curiam*); Section 5 Procedures, 28 C.F.R. § 51.49. No new voting practice is enforceable unless the covered jurisdiction first has succeeded in obtaining preclearance. *Id.* If a voting change subject to Section 5 has not been precleared, Section 5 plaintiffs are **entitled** to an injunction prohibiting implementation of the change, **even as a court ordered remedy**. *Lopez*, 519 U.S. at 20-22; *Clark*, 500 U.S. at 652-653. Once a Section 5 determination is made by the United States Attorney General, it is not subject to judicial review. *Morris v. Gressette*, 432 U.S. 491 (1971). Finally, a court may not address the validity of a covered voting change, such as a redistricting plan, unless and until the plan has received the requisite preclearance under Section 5. *Connor v. Waller*, 421 U.S. 656 (1975) (*per curiam*).

A narrow exception to this rule has been carved out by this Court in a situation where a letter of objection

specified a narrow problem that could easily be cured without affecting any other part of the redistricting plan, *Upham v. Seamon*, 456 U.S. 37 (1982).

The facts and the law of this case present an unusual situation. First, the plan adopted by the LRB should not have been considered for use in the upcoming elections because the State of Texas failed to secure preclearance. *Monterrey County*, 519 U.S. at 21-22. In *Monterrey County*, the State of California asked the Supreme Court to distinguish between the court's obligation to enjoin an unprecleared election plan and the court's remedial power to order an election plan. *Id.* The Supreme Court rejected the distinction as a basis for approval of the conduct of elections under an unprecleared plan:

> Regardless whether this distinction is meaningful, it does not advance the argument that the County's judicial elections may be held without § 5 preclearance. We have recognized, at least in cases arising under the Fourteenth Amendment, that § 5 preclearance requirements may not apply where a district court independently crafts a remedial electoral plan. (citations omitted). But where a court adopts a proposal "reflecting the policy choices . . . of the people [in a covered jurisdiction] . . . the preclearance requirement of the Voting Rights Act is applicable." (citations omitted) . . . It was, therefore, error for the District Court to order elections under that system before it had been precleared . . .

Id. Clearly, Plaintiffs were entitled to an injunction against the use of the LRB plan in Texas House of Representatives elections.

Contrary to the district court's interpretation, *Upham v. Seamon*, 456 U.S. 37 (1982), does not provide authority for using the LRB plan in a remedial plan under the facts of this case. In *Upham*, the DOJ objected to the State of Texas' congressional redistricting plan only with regard to two districts, 27 and 15. *Upham*, 456 U.S. at 38. The cure to the objected features of the plan was accomplished entirely within the boundaries of those two districts without altering any of the other 25 districts. *Id.* The district court, however, altered districts in Dallas County without a finding of a Voting Rights Act or Constitutional violation. *Upham*, 456 U.S. at 43. To do so was error. *Id.*

Unlike the limited objection in *Upham*, the letter of objection in the present case is much broader. The court's attempt to cure the objected features of the LRB plan simply falls short. For instance, the district court made no attempt to cure the retrogression described in the letter of objection with regard to district 35. Nor did the district court attempt to undo the retrogression noted by the letter of objection with regard to reducing the Spanish surnamed registration level in district 104. Nor did the district court address the retrogression found generally in South Texas where some districts were substantially reduced in Hispanic population while adjoining districts were packed at over 90% Spanish surnamed registration. The District Court's misapplication of *Upham*, however, results in the use of an unprecleared election plan, where the objected to features have not been completely cured, and ignores Section 5's prohibition against the use of unprecleared election plans. *Allen v. Board of Elections*, 393 U.S. 544 (1969).

III. The District Court Improperly Ordered A Redistricting Plan That Incorporated the Essential Core of the State's Proposed Remedy Plan Without the Required Section 5 Preclearance.

Where the Court adopts as its own, a redistricting plan that incorporates the policy choices of the covered jurisdiction, that plan must secure preclearance before it may be implemented. *McDaniel v. Sanchez*, 452 U.S. 130 (1981). This Court recently confirmed this rule:

> We have recognized, at least in cases arising under the Fourteenth Amendment, that § 5 preclearance requirements may not apply where a district court independently crafts a remedial electoral plan. (Citations omitted) **But where a court adopts a proposal "reflecting the policy choices . . . of the people [in a covered jurisdiction] . . . the preclearance requirement of the Voting Rights Act is applicable." (Citations omitted) . . . It was, therefore, error for the District Court to order elections under that system before it had been precleared.**

Monterrey County, 519 U.S. at 22. (Emphasis added.) Unless the redistricting plan is "wholly developed" by the district court it must be precleared. *Lopez v. Monterrey County*, 525 U.S. 266, 287 (1999).

In the present case the district court adopted the State's LRB plan except for modifications in Bexar and Cameron Counties and in District 74. In making modifications, however, the court incorporated the changes submitted by the State of Texas for District 35, and the districts that surround it. In spite of incorporating state policy choices in its remedy, the District Court found no

preclearance was required. Such a determination is inconsistent with the rule established by this court in *McDaniel v. Sanchez.*

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and set the case for argument.

Respectfully submitted,

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February 2002

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

SIMON BALDERAS, ET AL.	§	
vs.	§	CIVIL ACTION
STATE OF TEXAS, ET AL.	§	NO. 6:01CV158
	§	

This Filing Applies to: All Actions

FINAL JUDGMENT

(Filed Nov. 28, 2001)

On the 13th day of November, the above referenced civil action came on for trial. The court heard evidence and argument and considered the parties' post-trial briefing. For the reasons expressed in the court's *per curiam* decision issued today, the court renders judgment adopting Plan 1369H as the remedial House districting plan for the State of Texas.

The Texas Legislative Council's statistical package for Plan 1369H is attached as Exhibit A to this judgment and is incorporated by reference. The maps associated with Plan 1369H are attached as Exhibit B to this judgment and are incorporated by reference.

All relief not granted is denied. Costs of court are taxed against the State of Texas.

So **ordered** and **signed** this 28th day of November, 2001.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

/s/ John Hannah, Jr.
JOHN HANNAH, JR. /s/ JW
UNITED STATES DISTRICT JUDGE

/s/ T. John Ward
T. JOHN WARD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

SIMON BALDERAS, ET AL.	§	
vs.	§	CIVIL ACTION
STATE OF TEXAS, ET AL.	§	NO. 6:01CV158
	§	(Filed Nov. 28, 2001)

This Filing Applies to: All Actions

Before HIGGINBOTHAM, Circuit Judge, HANNAH and WARD, District Judges.

PER CURIAM:

This phase of the case involves the redistricting of the Texas State House of Representatives following the 2000 census. Following the failure of the state legislature to implement a redistricting plan for the House, the state constitutionally-created Legislative Redistricting Board adopted a plan, Plan 1289H, on July 24, 2001, to redistrict the 150 House seats.[1] Because Texas is a "covered" jurisdiction under section 5 of the Voting Rights Act, the State then submitted this plan to the United States Department of Justice for preclearance on August 16, 2001.[2] We heard evidence relating to House redistricting on November 13-15, 2001. On November 16, 2001, the Justice Department objected to the LRB House plan as causing a retrogression with respect to the number of Hispanic

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[1] *See* Tex. Const. art. III, § 28.

[2] *See* 42 U.S.C. § 1973c.

opportunity districts. We will first describe the course of this litigation and then address the parties' contentions.

I

Voters and various officeholders filed multiple lawsuits in state and federal court challenging the districting of Texas congressional seats and both houses of the state legislature based on the 2000 census.[3] The federal cases were consolidated into the earliest-filed federal action, *Balderas v. Texas*, No. 6:01-CV-150, before this three-judge court.[4]

The Texas Constitution requires that the Texas legislature, "at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts."[5] The Constitution also provides that, "[i]n the event the Legislature shall at any such first regular session following the publication of a United States decennial census, fail to make such apportionment, same shall be done by the Legislative Redistricting Board of Texas," which is "composed of

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[3] *Balderas v. Texas*, Civil No. 6:01-CV-158 (E.D. Tex.); *Mayfield v. Texas*, Civil No. 6:01-CV-218 (E.D. Tex.); *Manley v. Texas*, Civil No. 6:01-CV-231 (E.D. Tex.); *Del Rio v. Perry*, No. GN-003665 (353rd Dist. Ct., Travis County, Tex.); *Cotera v. Perry*, No. GN-101660 (353rd Dist. Ct., Travis County, Tex.); *Connolly v. Perry*, No. GN-102250 (98th Dist. Ct., Travis County, Tex.); *Associated Republicans of Texas v. Cuellar*, No. 2001-26894 (281st Dist. Ct., Harris County, Tex.); *Rivas v. Cuellar*, No. 2001-33760 (152nd Dist. Ct., Harris County, Tex.).

[4] Other three-judge courts had dismissed prior suits filed prematurely.

[5] Tex. Const. art. III, § 28.

five (5) members, as follows: The Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office."[6] In May 2001, the 77th Legislature adjourned *sine die* without enacting Senate and House redistricting plans and so the LRB convened and adopted Senate and House redistricting plans on July 24, 2001. Under state law, these plans, "executed and filed with the Secretary of State, shall have force and effect of law."[7]

Pursuant to the Supreme Court's direction in *Growe v. Emison*,[8] on July 23, 2001 we deferred proceedings in federal court until October 1, 2001. Proceedings on the congressional redistricting concluded on November 2, 2001 and our order issued on November 14, 2001. The Justice Department precleared the Senate LRB plan on October 15, 2001, and we heard evidence and arguments relating to challenges to that plan on November 5-6, 2001.

From November 12-15, 2001 we heard evidence relating to redistricting of the Texas House of Representatives. We did not reach a judgment, instead awaiting the Justice Department's decision on preclearance of the LRB House plan. On November 16, 2001, the Justice Department objected to parts of the LRB House plan as causing an impermissible retrogression in Hispanic voting strength. The parties submitted post-trial briefs on November 21, 2001 addressing the Justice Department's objection with

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[6] *Id.*

[7] *Id.*

[8] 507 U.S. 25 (1993).

suggested remedies as well as a remedies for any other alleged federal statutory and constitutional defects in the LRB plan.

II

Our decision here is limited to correcting the federal constitutional and statutory defects in the LRB House plan, including the concerns raised in the objection of the Justice Department.[9] That approach is dictated by the Supreme Court's decision in *Upham v. Seamon*.[10] That case dealt with the reapportionment of congressional districts in Texas following the 1980 decennial census. The legislature passed a redistricting plan, which was submitted to the Justice Department for preclearance. As in this case, the Justice Department objected to the state plan. A three-judge district court remedied the problems identified by the Justice Department, but also went further, and changed portions of the map in which the Justice Department had raised no Section 5 concerns. The Supreme Court reversed, noting that it had "never said that the entry of an objection by the Attorney General to any part of a state plan grants a district court the authority to

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[9] To the extent the plaintiffs raise claims that ask that this court enforce state law against the State, they are barred by the Eleventh Amendment, and this court has no jurisdiction to hear them, whether for injunctive or for declaratory relief. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 121 (1984); *Watson v. Texas*, 261 F.3d 436, 440-41 (5th Cir. 2001); *Earles v. State Bd. of Certified Public Accountants of La.*, 139 F.3d 1033, 1039-40 (5th Cir. 1998); *Hays County Guardian v. Supple*, 969 F.2d 111, 125 (5th Cir. 1992).

[10] 456 U.S. 37 (1982).

disregard aspects of the legislative plan not objected to by the Attorney General."[11] The Supreme Court held that a district court's modifications to a state plan, after objections by the Justice Department, should be "limited to those necessary to cure any constitutional or statutory defect."[12]

Speaker Laney argues that *Upham* is not controlling because the Justice Department has raised more numerous concerns in this plan than it did in the 1980 congressional plan. In *Upham* and in this case, because retrogression is measured against the entire State, the Justice Department objected to the entire plan.[13] While our remedy may affect portions of the map adjacent to those districts the Justice Department addressed in its objection, we may not depart from *Upham*. We address first those federal statutory and constitutional claims raised by the parties in this case, and then the Justice Department's objections and our remedy.

III

A

Looking first to the Balderas plaintiffs' claims, we find that the Latino population is not sufficiently compact or numerous to support additional Latino districts. We also find that, under the totality of the circumstances, the failure to create additional Latino majority districts will

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[11] *Id.* at 43.

[12] *Id.*

[13] *See id.* at 38 n.1.

not prevent full and equal Latino participation in the political process. Indeed, the creating of additional districts beyond those in our adopted plan would risk giving rise to retrogression in existing Latino majority districts. We conclude that the Balderas plaintiffs have failed to prove that Section 2 of the Voting Rights Act requires the creation of additional Latino districts based upon allegations of Latino vote dilution.[14]

B

The Amps intervenors have similarity failed to identify a violation of Section 2 of the Voting Rights Act that would compel the creation of an African-American opportunity district in Tarrant County. Their proposed minority opportunity district relies on a supposed coalition of Latino, Asian, and African-American populations to achieve majority-minority populations, presenting testimony that members of these populations have worked together in campaigns. The evidence does not persuade us, however, that Latinos, Asians, and African-Americans vote cohesively as required by *Thornburg v. Gingles*[15] so as

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[14] The Mayfield plaintiffs and Speaker Laney invite us to recognize and sustain a challenge to the LRB plan based on minority influence districts. We reiterate that we have no power to address such claims. *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-53 (5th Cir. 1999); *see also Johnson v. De Grandy*, 512 U.S. 997, 1008-09 (1994) (declining to decide whether "influence district" claims are cognizable under section 2 and citing three prior cases in which the Court similarly declined to so decide).

[15] 478. U.S. 30, 50-51 (1986).

to constitute a majority in a single-member district.[16] There is no section 2 violation, and therefore we have no authority to add an opportunity district.

C

Speaker Laney also argues that certain districts are unconstitutional because they are the product of intentional racial discrimination, in violation of the Equal Protection Clause. We find no such violation.

Having rejected the parties' claims, we now address the Justice Department's objection and fashion a remedy. We detail this remedy below.

IV

Before discussing the Justice Department's concerns and our remedy, we wish to be clear that our plan is a judicial plan and, while it unavoidably bears some resemblance to plans submitted by the parties in certain areas, it is entirely of our own making. Therefore it is not subject to the preclearance requirements of Section 5 of the Voting Rights Act.[17]

The Justice Department concluded that the LRB plan represented an impermissible retrogression of Latino voting strength in South and West Texas. Specifically, the Justice Department objected to the loss of a Latino District in Bexar County, as well as the reduction of Latino

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[16] *See Growe*, 507 U.S. at 41; *Valdespino*, 168 F.3d at 852-53.

[17] *Lopez v. Monterey County*, 525 U.S. 266, 704-05 (1999).

voting strength in Districts 35, 38, and 74. The plan we have adopted addresses all of their concerns.

In Bexar County, the LRB plan reduced the number of majority Latino districts from seven to six. We reconstituted a seventh majority Latino district without pairing any Latino incumbents or splitting any Voter Tabulation Districts, and we equalized the level of Spanish surnamed registration (SSRV) among all seven Latino districts. Each district has an SSRV of at least 55 percent, allowing Latinos in those districts to elect a candidate of their choice.

The Justice Department also objected to the LRB's proposed District 38, which reduced the Spanish surnamed registration level from 70.8 to 60.7 percent. The LRB Plan also removed over 40 percent of the core of the existing District 38, 90 percent of which was Latino. To respond to these objections, we modified the district. The new district has an SSRV level of 73.4 percent and current District 38 residents make up 83.1 percent new District 38. Thus, we preserve the opportunity for Latinos to elect their candidate of choice.

Similarly, the Department objected to the proposed District 74, which reduced the Spanish surname registration level from 64.5 to 48.7 percent. We reconfigured District 74, raising its SSRV level to 54.0 percent, while preserving county lines as required by the Texas Constitution. While the resulting district still has a lower SSRV level than the existing District 74, this is necessary to maintain District 80 as an additional Latino district. The SSRV level in District 74 is high enough to preserve

Latino voting strength, and does not require us to dismantle District 80 or radically redraw the entire state map. The LRB created District 80 as an additional Latino District and our map keeps it as such.

The Justice Department also objected to the proposed District 35. In the LRB plan District 35 paired a Latino incumbent and an Anglo incumbent in a district in which the Anglo had maintained a higher proportion of her constituents. Our modifications eliminate the pairing, maintaining a heavily Democratic District 35 with no incumbent, and an SSRV of 51.5%.

V

There being no reason for delay, we direct entry of final judgment in this case pursuant to Federal Rule of Civil Procedure 54(b).

So **ordered** and **signed** this 26th day of November, 2001.

/s/ Patrick Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

/s/ John Hannah, Jr.
JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

/s/ T. John Ward
T. JOHN WARD
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

SIMON BALDERAS, ET AL.	§	CIVIL ACTION NO. 6:01 CV 158
VS.	§	(Filed Nov. 30, 2001)
STATE OF TEXAS ET AL.	§	

This Filing Applies to: All Actions

JOHN HANNAH, JR., Chief District Judge, having concurred in the judgment, writes further.

I have concurred with the legal conclusion reached by my brethern in regard to the House and Senate Redistricting Plan. I write separately to express my shock at the drawing of districts by the State of Texas. The dominant political party treated all members of the opposing party as if they were "enemies of the State" instead of respected state leaders, many with a great wealth of governmental knowledge and ability that has and could insure to the benefit of Texas.

The State has obviously ignored traditional redistricting principles in favor of political expediency. The State's lack of respect for political subdivisions is evident. Two examples from the State's Senate Plan will suffice although many examples from the House and Senate Plan could be cited.

El Paso County's population according to the 2000 Census is 679,622. The population figure for an ideal

senate district is 672,639. A respect for political subdivisions would suggest making El Paso County into a single senatorial district. However, the State unnecessarily splits the El Paso County into Districts 29 and 19. It places the residents of southern El Paso County in District 19 along with 335,367 persons from Bexar County, hundreds of miles away and of a different community of interest.

Even more offensive is Senate District 17, a district described even by the State's own expert witness as weird, odd and bizarre. Stretching over 180 miles from University Park in Harris County to the Louisiana border, it is barely a mile wide in spots, and requires travel by boat to meet the standards of contiguity. Starting in University Park and Bellaire, in Harris County, Anglo enclaves within the borders of the City of Houston, it snakes west through a narrow corridor to another Anglo enclave of middle and upper middle class homes in the western suburbs of Houston, out to the edge of Anglo Katy. It wends it ways south into another exclusive Anglo stronghold in the First Colony area of Fort Bend County, carefully avoiding the sections of Black population in bordering Missouri City while retaining the Anglo populations of Missouri City. After wending its way south through the Anglo portions of Fort Bend County, it reaches into Brazoria County. It then veers northeast along a narrow strip to Galveston County, taking in the Anglo community of Jamaica Beach and a narrow part of the City of Galveston which borders the beach, but draws is line at the neighborhood of Galveston which contain a large Black population. The district continues its northeast direction along the cost of Chambers County, where its main inhabitants are the birds in the Anuhuac

National Wildlife Refuge, the population maps showing zero for human inhabitants in District 17's section of Chambers County. Travel from the Galveston portion of this district into the Chambers County portion of this district, if eschewing a route into District 4, requires a trip on the Bolivar Ferry onto the Bolivar Peninsula. The District ends in Jefferson County, at the border of Louisiana. In Jefferson County, it splits the community of Port Arthur from its suburbs and, more importantly from Beaumont. The district lines show a careful encompassment of the small black community within Port Arthur while rejecting the larger Black bordering community of Beaumont.

Examining District 17, referred to in the trial of this case as the "fish hook," we note its extremely irregularity on its face and deplore the State's rejection of traditional redistricting principles such as compactness, respect for political subdivisions, and community of interests. 6 county lines are split by this district and no whole county is included. Further, District 17 splits 17 or 18 towns and cities in its meander through the coastal plane of southeastern Texas.

The evidence concerning the lack of regard for traditional communities of interest was compelling. Jefferson County residents testified that they are often adverse to residents of Harris County on issues of air pollution and water rights and that the working class communities of Jefferson County have nothing in common with the middle and upper middle class suburbs of Houston or with exclusive University Park. There was testimony that Jefferson County has been wholly within one senate district for the last 168 years.

Further, evidence showed that District 17 as it now stands, was introduced by a last minute amendment, and voted on by the Legislative Redistricting Board over the strong objection of Lieutenant Governor Raftliff who deplored the lack of fairness inherent in voting on an amendment which the public had not have a chance to see.

All this being said, the federal courts have a limited roles in considering challenges to precleared, legislatively-adopted redistricting plans. We may not substitute our judgment for that of the Legislature, in this case, the Legislative Redistricting Board, unless we find that the plan runs afoul of federal law. The state may engage in political gerrymandering even if it "so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact."[1] However, I concur with the legal conclusion that plaintiffs have failed to meet their evidentiary burden of showing that the Texas Senate plan violates the Constitution or laws of the United States, as distasteful as portions of it may be.

SIGNED this 30th day of November, 2001.

/s/ John Hannah, Jr.
JOHN HANNAH, JR.
Chief District Judge

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[1] *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

SIMON BALDERAS, ET AL.	§	
Vs.	§	NO. 6:01CV158
STATE OF TEXAS, ET AL.	§	

This Filing Applies to:
All Actions

AMENDED JUDGMENT

(Filed Jan. 18, 2002)

We grant the state's Rule 59 motion to amend judgment (#472) in part. We amend our final judgment in the Senate case (#460) to read as follows:

On the 5th day of November, 2001, the above-referenced civil action came on for trial. The court heard evidence and argument and considered the parties' post-trial briefing. For the reasons previously expressed in the court's *per curiam* decision, the court renders judgment for the State of Texas and affirms that Plan 1988 is the legal Senate districting plan for the State of Texas.

All relief not granted is denied. Costs of court are taxed against the party incurring same.

So Ordered and Signed this 18th day of January, 2002.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT
JUDGE

/s/ John Hannah Jr
JOHN HANNAH, JR.
UNITED STATES DISTRICT
JUDGE

/s/ T. John Ward
T. JOHN WARD
UNITED STATES DISTRICT
JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

SIMON BALDERAS, ET AL.	§	
Plaintiffs,	§	NO. 6:01-CV-158
MEXICAN AMERICAN LEGISLATIVE CAUCUS TEXAS HOUSE OF REPRESENTATIVES	§	
Plaintiff	§	
vs.	§	
STATE OF TEXAS, ET AL.	§	
Defendants	§	

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

(Filed Dec. 20, 2001)

Notice is hereby given that the Mexican American Legislative Caucus, Texas House of Representatives, Plaintiff in this cause, appeals to the Supreme Court of the United States from the Final Judgment and Per Curiam Opinion adopting a redistricting plan for the Texas House of Representatives filed and entered in this action on November 28, 2001.

This appeal is taken pursuant to Title 28, United States Code, Sections 1253 and 1291 and Title 42, United States Code, Section 1973c.

DATED: December 18, 2001

Respectfully Submitted,

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION

SIMON BALDERAS, ET AL.	§	
Plaintiffs,	§	NO. 6:01-CV-158
MEXICAN AMERICAN LEGISLATIVE CAUCUS TEXAS HOUSE OF REPRESENTATIVES	§	
Plaintiff	§	
vs.	§	
STATE OF TEXAS, ET AL.	§	
Defendants	§	

AMENDED NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

Notice is hereby given that the Mexican American Legislative Caucus, Texas House of Representatives, Plaintiff in this cause, appeals to the Supreme Court of the United States from the Final Judgment and Per Curiam Opinion adopting a redistricting plan for the Texas House of Representatives filed and entered in this action on November 28, 2001 and subject to the Court's Order on the Motion to Amend Judgment entered on January 18, 2002 making the judgment final.

This appeal is taken pursuant to Title 28, United States Code, Sections 1253 and 1291 and Title 42, United States Code, Section 1973c.

DATED: February 6, 2002

Respectfully Submitted,

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APPENDIX F

42 U.S.C. Sec. 1973. – Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a)

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b)

A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population

APPENDIX G

42 U.S.C. Sec. 1973c. – Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a

declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise

require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court

APPENDIX H

[LOGO] U.S. DEPARTMENT OF JUSTICE
Civil Rights Division

Office of The Assistant Attorney General
Washington, DC 20035

NOV 16 2001

The Honorable Geoffrey Connor
Acting Secretary of State
P.O. Box 12060
Austin, Texas 78711-2060

Dear Secretary Connor:

This refers to the 2001 redistricting plan for the Texas House of Representatives, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on August 17, 2001; supplemental information was received through October 12, 2001.

We have considered carefully the information you have provided, as well as census data, comments and information from other interested parties, and other information. As discussed further below, I cannot concludes that the State's burden under Section 5 has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the 2001 redistricting plan for the Texas House of Representatives.

The 2000 Census indicates that the State has a total population of 20,851,820, of whom 11.5 percent are African American and 31.9 percent are Hispanic. The State's voting age population (VAF) is 14,955,061, of whom 10.9

percent are African American and 28.6 percent are Hispanic. One of the most significant changes to the State's demography has been the increase in the Hispanic population. Between 1990 and 2000, the Hispanic share of the State's population increased from 26 to 31.9 percent. Statewide, African American population remained stable.

Under the Voting Rights Act, a jurisdiction seeking to implement a proposed change affecting voting, such as a redistricting plan, must establish that, in comparison with the status quo, the change does not "lead to a retrogression" in the position of minority voters with respect to the "effective exercise of the electoral franchise." See *Beer v. United States*, 425 U.S. 130, 143 (1976). In addition, the jurisdiction must establish that the change was not adopted with an intent to retrogress. *Reno v. Bossier Parish School Board*, 528 U.S. 320, 340 (2000). Finally, the submitting authority has the burden of demonstrating that the proposed change has neither the prohibited purpose nor affect. *Id.* at 328; see also *Procedures for the Administration of Section 5* (28 C.F.R. 51.52).

The constitutional requirement of one-person, one-vote mandated that the State reapportion the house districts in light of the population growth since the last decennial census. We note that the redistricting plan submitted by the State was passed by the Legislative Redistricting Board (LRB), which had assumed reapportionment responsibility under article III of the Texas Constitution after the State legislature was unable to enact a redistricting plan.

The LRB held a series of meetings and hearings, culminating with a meeting on July 24, 2001, at which it

considered new plans submitted by LRB members. The LRB adopted three amendments making substantive changes to the plan then under consideration. These amendments consisted of approximately 14 discrete changes.

The Texas House of Representatives consists of 150 members elected from single-member districts to two-year terms. Under the existing plan, there are 57 districts that are combined majority minority in total population, and 53 are combined majority minority in voting age population. With regard to those with a majority minority voting age population, 31 districts have a majority Hispanic voting age population, seven have a majority black voting age population, and the remaining 15 districts have a combined minority majority voting age population. There are 27 districts where a majority of the registered voters have a Spanish surname.

An initial issue arises as to the appropriate standard for determining whether a district is one in which Hispanic voters can elect a candidate of choice. The State of Texas has provided, and accepted as a relevant consideration, Spanish-surnamed registered voter data as well as election return information and voting age population data from the census. We agree with the State's assessment, although we also consider comments from local individuals familiar with the area, historical election analysis, analysis of local housing trends, and other information intended to create an accurate picture of citizenship concerns. *Campos v. Houston*, 113 F.3d 544, 548 (5th Cir. 1997).

Our examination of the State's plan indicates that it will lead to a prohibited retrogression in the position of minorities with respect to their effective exercise of the electoral franchise by causing a net loss of three districts in which the minority community would have had the opportunity to affect its candidate of choice. Although there is an increase in the number of districts in which Hispanics are a majority of the voting age population, the number of districts in which the level of Spanish surnamed registration (SSRV) is more than 50 percent decreases by two as compared to the benchmark plan. Moreover, we note that in two additional districts SSRV has been reduced to the extent that the minority population in those districts can no longer elect a candidate of choice. In the State's plan these four reductions are only offset by the addition of a single new majority minority district – District 80 – leaving a net loss of three.

As described more fully below, when coupled with an analysis of election returns and other factors, we conclude that minority voting strength has been unnecessarily reduced in Bexar County, South Texas, and West Texas. Because retrogression is assessed on a state-wide basis, the State may remedy this impermissible retrogression either by restoring three districts from among these problem areas, by creating three viable new majority minority districts elsewhere in the State, or by some combination of these methods.

With regard to the problem areas we have identified, in Bexar County the 2000 Census data indicated that the county population constituted 10.4 ideal districts. As a result of the State's constitutional requirement of assigning a whole number of districts to the more populous

counties, known as the "county line rule," the state reduced the number of districts in the county from 11 in the existing plan to 10. Although the State has admitted that the reduction to 10 would not have precluded it from maintaining the number of majority Hispanic districts at seven, it in fact chose to reduce that number to six. Initially, the State asserted that it had created an additional majority Hispanic district in Harris County so as to offset the loss of the Bexar County district and identified District 137 as a compensating district. Because the State's obligation under Section 5 so to ensure that the redistricting plan, as a whole, is not retrogressive, such a course of action is not impermissible. However, in the supplemental materials that were provided on October 10, 2001, the State notified us that if any district should be considered as the replacement, District 80 in South Texas – not District 137 – should be the one which offsets the loss of the majority Hispanic district in Bexar County.

When the State is considered as a whole, however, this argument is ultimately unpersuasive. While District 80 indeed adds an additional district in which Hispanic voters in South Texas will have the opportunity to elect a candidate of their choice, in two other districts, as discussed below, they lose this opportunity, resulting in the net loss for Hispanic voters of one district in South Texas.

In South Texas Hispanic voters will lose the opportunity to elect their candidate of choice in District 35. The new district is created from existing Districts 31 and 44 and pairs an [sic] nonminority and a Hispanic incumbent. The Hispanic incumbent currently represents a district which has a Spanish surname registration level of 55.6 percent; that level drops to 50.2 percent in the proposed

plan while the Hispanic voting age population decreases from 57.8 to 52.1 percent. Over half (58%) of the new district's configuration is from the nonminority incumbent's former district. Our analysis indicates that District 35 as drawn will preclude Hispanic voters from electing their candidates of choice.

In addition, in [sic] Cameron County District 38 reverts to a configuration that previously precluded Hispanic residents from electing a candidate of their choice. The Spanish surnamed registration level is reduced from 70.8 to 60.7 percent, and the Hispanic voting age population decreases from 78.7 percent to 69.6 percent. The State removed over 40 percent of the core of existing District 38, 90 percent of whom are Hispanic persons, and replaced it with population that is 45 percent nonminority. While the Hispanic voters in District 38 still remain a majority of voters in the district, because the area is subject to polarized voting along racial lines and under the particular circumstances present in this district, it is doubtful that Hispanics will be able to elect their candidate of choice.

Finally, the districts adjacent to Districts 35 and 38 have levels of Spanish surnamed registered voters exceeding 80 percent, and Hispanic voting age population exceeding 90 percent, both of which are far beyond what is necessary for compliance with the Voting Rights Act. Thus the reductions in Districts 35 and 38 were avoidable had the State avoided packing Hispanic voters into the districts adjacent to them. Moreover, overall the State fragments the core of majority Hispanic districts in this area, thus affecting member-constituent relations and existing communities of interest in these districts at a

disproportionately higher rata than it does other districts in this part of the State. This fragmentation is unnecessary and disadvantages Hispanic voters by requiring them to establish new relations with their elected representatives. It also deviates from the State's traditional redistricting principles in a manner that exacerbates the retrogression in South Texas.

As for West Texas, Hispanic voters lose the opportunity to elect their candidate of choice in proposed District 74. The Spanish surname registration level decreases from 54.5 to 48.7 percent, and the Hispanic voting age population decreases from 73.4 to 57.3 percent. Significantly, the State did not need to reconfigure existing District 74 because the existing configuration under the 2000 Census was underpopulated by only 894 persons, a deviation of 0.64 percent. Such unnecessary population movement supplements our finding in our election analysis that Hispanic voters in District 74 will suffer a retrogression in the effective exercise of the electoral franchise. See *Guidance Concerning Redistricting and Retrogression under Section 5 of the Voting Rights Act,* 42 U.S.C. 1973c. 66 Fed. Reg. 5411, 5413 (Jan. 18, 2001).

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *Georgia v. United States,* 411 U.S. 526 (1973); see also *Procedures for the Administration of Section 5* (28 C.F.R. 51.52). In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. On behalf of the Attorney General, I must object to the 2001 redistricting plan for the Texas House of Representatives. Beyond the specific discussion

above, however, in all other respects we find that the State has satisfied the burden of proof required by Section 5.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the redistricting plan continues to be legally unenforceable. *Clark v. Roemer,* 500 U.S. 646 (1991); 28 C.F.R. 51.10.

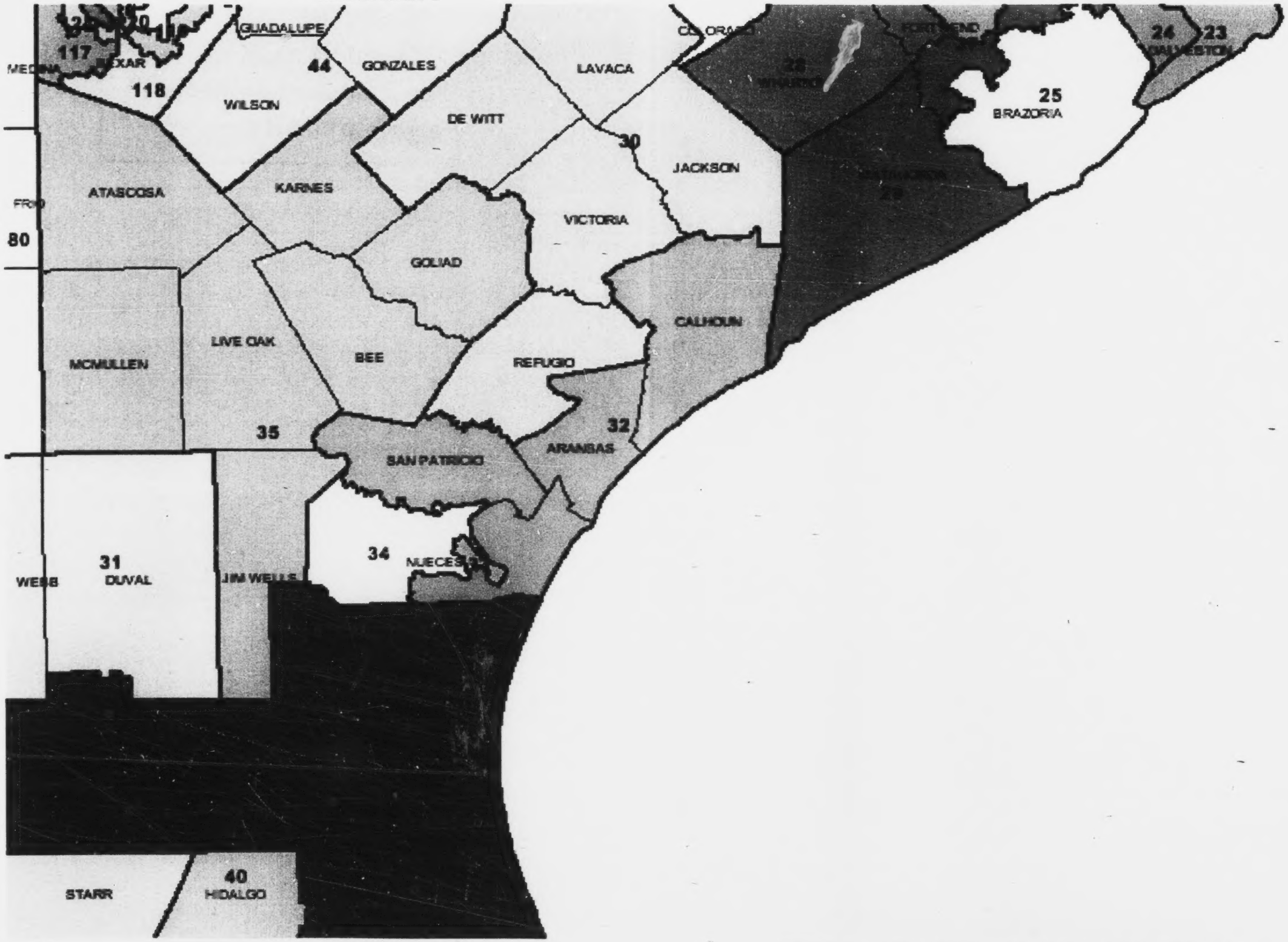
To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas plans to take concerning this matter. If you have any questions, you should call Mr. Robert Berman [202-307-3718], Deputy Chief of the Voting Section.

Sincerely,

/s/ Ralph F. Boyd, Jr.
Ralph F. Boyd, Jr.
Assistant Attorney General
Civil Rights Division

District 35
State House District
Texas House Districts Ordered by Federal Court

APPENDIX I



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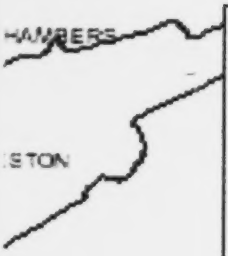
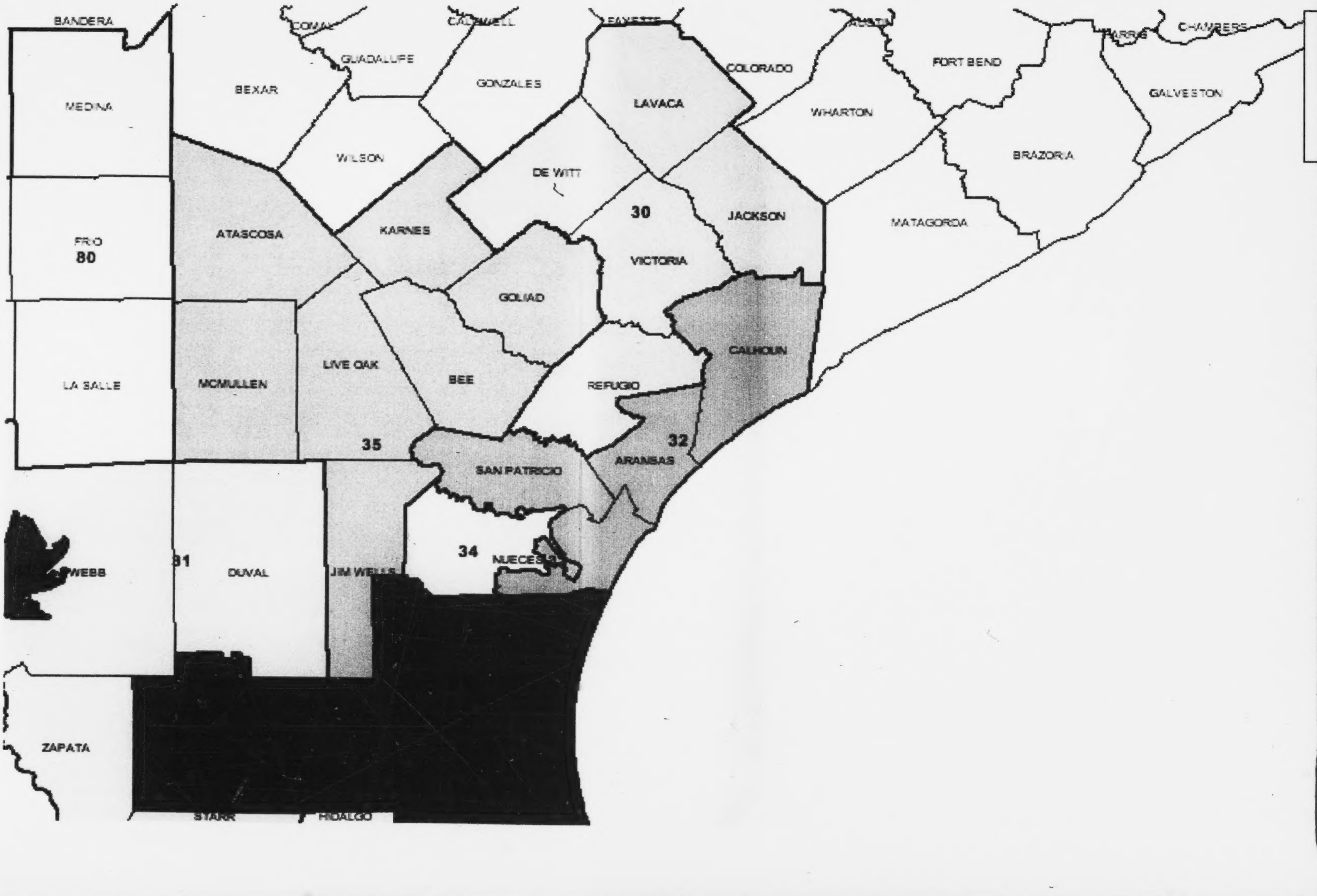


District 35
State House District
Proposal to Federal Court by Attorney General Cornyn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VICTORIA
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GOLIAD
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NUECES
WEBB
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DUVAL
JIM WELLS
ZAPATA
STARR
HIDALGO

Supreme Court U.S.
FILED
MAR 22 2002
OFFICE OF THE CLERK

No. 01-1225

In the Supreme Court of the United States

MEXICAN AMERICAN LEGISLATIVE CAUCUS-TEXAS HOUSE OF REPRESENTATIVES,
Appellant,

v.

STATE OF TEXAS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas, Tyler Division

MOTION TO DISMISS OR AFFIRM

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COUNSEL FOR APPELLEES

QUESTIONS PRESENTED

1. Whether Appellant's §2 challenges should be dismissed because those challenges (1) were not properly before the three-judge court, and (2) attack the wrong redistricting plan.

2. Whether the judgment should be summarily affirmed because, in accordance with *Upham v. Seamon*, 456 U.S. 37 (1982), the three-judge court properly adopted a plan that used the unobjected-to portion of the State's plan as the baseline and narrowly remediated the Department of Justice's §5 retrogression concerns.

3. Whether the three-judge court's per curiam opinion—which adequately states the factual and legal bases for the court's judgment—violates Federal Rule of Civil Procedure 52(a).

LIST OF PARTIES

Although Appellant properly lists Henry Cuellar, in his capacity as Texas Secretary of State, as a party to the action below, he is not a party to this appeal because the current Texas Secretary of State is Gwyn Shea.

Former Texas Secretary of State Cuellar was originally named in his official capacity as a defendant below, but he resigned from office in late 2001. Geoffrey S. Connor then served as Acting Secretary of State, and he automatically substituted for Secretary Cuellar in the proceeding below. FED. R. CIV. P. 25(d)(1). For this appeal, however, the current Secretary of State, Gwyn Shea, is automatically substituted, in her official capacity, in place of Acting Secretary Connor. SUP. CT. R. 35.3.

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In the
Supreme Court of the United States

MEXICAN AMERICAN LEGISLATIVE CAUCUS-
TEXAS HOUSE OF REPRESENTATIVES,
Appellant,

v.

STATE OF TEXAS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas, Tyler Division

MOTION TO DISMISS OR AFFIRM

Pursuant to Supreme Court Rule 18.6, the State of Texas, Texas Governor Rick Perry, and Texas Secretary of State Gwyn Shea (collectively "the State") move to dismiss this appeal to the extent it raises §2 issues that were not properly before the three-judge court and, otherwise, to affirm the judgment on the ground that the questions presented are so insubstantial as not to require further argument. SUP. CT. R. 18.6.

STATEMENT OF THE CASE

The State directs the Court to the statement of proceedings set forth in the three-judge court's opinion, which is a fair recitation of the proceedings leading up to this appeal. J.S. App., at 3-6.[1]

1. Appellant's Jurisdictional Statement will be cited as "J.S."

ARGUMENT

I. THE COURT SHOULD DISMISS THE PORTION OF THIS APPEAL RAISING §2 CHALLENGES.

A. Appellant's §2 Issues Were Not Properly Before the Three-Judge Court.

Appellant's §2 challenge to the Legislative Redistricting Board (LRB)[2] redistricting plan for the Texas House of Representatives was not properly before the three-judge court because the plan never went into effect and, therefore, was not subject to challenge. As a matter of law, a legislative plan is not effective until it is precleared; therefore, any court ruling on a §2 challenge to an unprecleared plan would be an advisory opinion. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535, 542 (1978) ("A new reapportionment plan . . . will not be considered 'effective as law' . . . until it has been submitted and has received preclearance under §5. . . . [U]ntil clearance has been obtained, a court [should not] address the constitutionality of the new measure."); *Connor v. Waller*, 421 U.S. 656 (1975) (because an act is not effective until it is precleared, the district court erred in deciding constitutional challenges based on claims of racial discrimination).

Since the LRB plan was not precleared, Appellant's §2 issues challenging the LRB plan were never before the district court, *see* J.S., at 11-13, and these issues, therefore, are not before this Court.[3]

---

2. The LRB has a constitutional duty to reapportion seats in the Texas House of Representatives and Texas Senate, but not U.S. Congress, after a decennial census if the Texas Legislature fails to do so. TEX. CONST. art. III, §28. The LRB passed a House plan, Plan 1289-H, as well as a Texas Senate plan, Plan 1188-S, and both were sent to the Department of Justice for preclearance.

3. A three-judge court's role, in the face of a DOJ objection, is to remediate the objected-to plan only to the extent required by federal law.

The three-judge court carefully structured the redistricting litigation—which consisted of congressional, Texas Senate, and Texas House of Representatives trials—to avoid considering any unprecleared, and thus ineffective, plans.[4] Accordingly, the court tried the cases in the order most likely to avoid consideration of a plan that was subject to preclearance requirements but had not yet completed the process of DOJ's §5 review.

The court first tried the congressional case, since the State failed to pass a congressional plan and, therefore, there was no pending §5 review. The court next heard challenges to the LRB's Texas Senate plan, which was precleared three weeks before that trial began. Due to time constraints of the 2002 electoral process, however, the three-judge court began the Texas House trial on November 12, 2001, in the absence of a DOJ ruling.[5]

Following the example of *Upham v. Seamon*, 456 U.S. 37, 38 (1982), and *Terrazas v. Clements*, 537 F.Supp. 514, 519 (N.D. Tex. 1982), the three-judge court heard evidence on the Texas House

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See, e.g., Upham v. Seamon, 456 U.S. 37, 41-43 (1982). Although the three-judge court was under an obligation not to transgress §2 in creating its plan, Appellant's specific §2 challenges were not before that court when it reached its decision.

4. Initially, the three-judge court deferred federal proceedings until October 1, 2001, to give Texas's state courts an opportunity to address redistricting concerns. *See Growe v. Emison*, 507 U.S. 25 (1993). Once it became apparent that the state courts would be unable to timely complete this task, the three-judge court proceeded with the federal trials.

5. The House trial began three weeks before December 3, 2001—the first day for candidate filing for the 2002 elections. TEX. ELEC. CODE §172.023(b). Filing was scheduled to close on January 2, 2002, a mere 51 days after the first day of trial. *Id.* §172.021(c).

districts; but it did not act until DOJ ruled.[6] Because DOJ found that the LRB plan retrogressed in violation of §5, the three-judge court fashioned its own plan to address DOJ's objections without unnecessarily disrupting the unobjected-to portions of the LRB's plan.[7] *See Upham*, 456 U.S., at 42-43.

Consequently, the three-judge court's remedial plan—not the ineffective LRB House plan—determined Texas's House districts. Appellant's §2 objections to the ineffective LRB plan were not properly at issue below, and they should not now be considered by this Court, since any pronouncement on the ineffective LRB plan would be an impermissible advisory opinion. The Court should dismiss this appeal to the extent it presents §2 challenges to the ineffective LRB plan.

B. Appellant's §2 Claims Challenge the Wrong Plan: The Three-Judge Court's Plan, Not the LRB Plan, Governs Texas's House Districts.

Although the three-judge court was required to start with the Texas House plan promulgated by the LRB as its baseline, *see Upham*, 456 U.S., at 37, 41-43, the court remediated the objected-to portions of that plan, producing a court-decreed plan for Texas's

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6. Optimally, a court would not hear evidence until after DOJ acted. Here, however, the imminence of the 2002 election process required the three-judge court to adopt this procedure if there was to be any possibility of deciding the case before the 2002 elections.

7. DOJ found that the LRB's plan (Plan 1289-H) created one new Hispanic district (District 80 in South Texas) but eliminated an existing Hispanic district (District 115 in Bexar County). In addition, DOJ identified three districts (Districts 74, 35, and 38) with Spanish-surname-registered-voter percentages of 48.7, 50.2, and 60.8, respectively, in which Latinos lost the opportunity to elect the candidate of their choice. Thus, the net effect of Plan 1289-H was a loss of three minority districts. *See* App., at 29-33.

House districts.[8] *See Wesch v. Hunt*, 785 F.Supp. 1491, 1499-1500 (S.D. Ala. 1992), *aff'd sub nom. Camp v. Wesch*, 504 U.S. 902 (1992) (quoting *McDaniel v. Sanchez*, 452 U.S. 130, 137 (1981)). The court's plan is the only plan currently in place, and it is therefore the only plan properly subject to challenge in this Court.[9]

Appellant, however, continues to challenge the validity of the LRB plan under §2 of the Voting Rights Act. The State maintains that the LRB plan does not violate §2. Regardless, when the three-judge court remediated that plan to correct DOJ's §5 objections, many of Appellant's concerns about specific districts were, in fact, changed in that process.[10] Therefore, Appellant's challenges to the LRB plan—rather than the three-judge court's plan—are irrelevant to this appeal from the judgment below, which should be summarily affirmed.[11]

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8. The three-judge court's plan is 1369-H, and the LRB's plan is 1289-H.

9. Essentially, Appellant attempts to appeal from language in the three-judge court's opinion—commenting that §2 does not require additional Latino districts, *see* App., at 7-8—rather than the court's judgment, which implemented a remedial House plan in place of the LRB plan. But it is the judgment—which was directed at DOJ's §5 objections, not Appellant's §2 claims—that must be the focus of this Court's review. *See Texas v. Hopwood*, 518 U.S. 1033, 1033 (1996) (Ginsburg, J., concurring in the denial of the petition for writ of certiorari) (noting that the Court "'reviews judgments, not opinions'") (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

10. *See e.g.*, App., at 9-11 (reinstating Districts 35, 74, and 115). Thus, whatever §2 complaints Appellants had about the LRB plan have no application to the court's plan—the only plan subject to this Court's review.

11. Even had Appellant challenged the court's plan, that plan passes muster under §2.

II. THE REMAINING QUESTIONS PRESENTED ARE NOT SUBSTANTIAL AND THE COURT SHOULD SUMMARILY AFFIRM.

A. The Three-Judge Court Properly Limited Its Remediation to Narrowly Address DOJ's §5 Objections to the LRB Plan.

Appellant erroneously argues that the three-judge court could not use the LRB plan as its baseline because that plan was not precleared by DOJ. J.S., at 16-18. This is simply incorrect. Although DOJ objected to the LRB plan on the ground that three additional Latino districts we required to avoid retrogression under §5, the plan survived DOJ scrutiny in all other respects:

> "Beyond the specific discussion above, however, in all other respects we find that the State has satisfied the burden of proof required by §5." App., at 32-33.[12]

Despite this clear language, Appellant contends that *Lopez v. Monterrey County*, 519 U.S. 9, 21-22 (1996), supports its argument that DOJ's objection precluded implementation of any aspect of the LRB plan. Appellant is mistaken. *Monterrey County* simply establishes that when a court adopts a plan that reflects the legislative "policy choices" of the State, that plan is subject to preclearance requirements. *Id.*, at 22. *Monterrey County* does not stand for the proposition that a plan must be precleared *a second*

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12. Because the LRB plan was not precleared in its entirety, it never took effect and thus was never subject to Appellant's §2 challenge. *See supra* Part I.A. However, that does not mean the court was required to ignore the unobjected-to portions in creating a remedial plan. To the contrary, *Upham* required the court to respect the LRB's policy choices to the extent they did not violate federal law. 456 U.S., at 42-43.

time if a court uses unobjected-to portions of a legislative plan as the baseline for a judicial plan.[13]

Similarly, Appellant mistakenly contends that DOJ's objections were global and required the three-judge court to reject the LRB plan in its entirety. Again, DOJ's letter establishes that this is incorrect. After outlining specific instances of retrogression in the LRB plan, DOJ stated:

> "Because retrogression is assessed on a state-wide basis, the State may remedy this impermissible retrogression either by restoring three districts from among these problem areas, by creating three viable new majority minority districts elsewhere in the State, or by some combination of these methods." App., at 29.

The three-judge court chose to rectify this limited retrogression by "restoring three districts from among the problem areas," as well as by adding back a Latino district in Bexar County. App., at 9-11. Any "taint" from DOJ's ruling affected only those portions of the LRB plan that had, in fact, drawn an objection. *Terrazas*, 537 F.Supp., at 537. In all other respects, the "vitality of the legislative judgment embodied in those portions of the LRB plans that are not the subject of continuing Section 5 objections" required deference to the LRB's enactment. *Id.* This approach is consistent with the Court's admonition that "a district court should not preempt the

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13. The three-judge court correctly used the precleared portions of the LRB plan as its baseline, because, as this Court has made clear, a district court errs when it: fails to adopt a remedial plan that "most closely approximate[s] the state-proposed plan" rejects "state policy choices more than was necessary to meet the specific constitutional violations involved"; or "disregards aspects of the legislative plan not objected-to by the [United States] Attorney General." *Upham*, 456 U.S., at 42-43 (discussing insufficient deference paid to state plans by three-judge courts).

legislative task nor 'intrude upon state policy any more than necessary.'" *Id.*, at 528 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)); *see also Upham*, 456 U.S., at 42-43.

The three-judge court adopted a plan that was faithful to this Court's jurisprudence, as well as to federal law, the federal Constitution, and Texas state policy. Accordingly, the judgment should summarily be affirmed.

B. The Three-Judge Court's Factual Findings Satisfy Rule 52 and Are Sufficient for Proper Appellate Review.

The Court should reject Appellant's argument that the three-judge court failed to comply with Federal Rule of Civil Procedure 52. The lower court's per curiam opinion satisfies Rule 52 and permits proper appellate review by "'giv[ing] the reviewing court a clear understanding of the factual basis for the decision.'" *Folger Coffee Co. v. Olivebank*, 201 F.3d 632, 635 (CA5 2000) (quoting *Burma Navigation Corp. v. Reliant Seahorse MV*, 99 F.3d 652, 656 (CA5 1996)); *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1444 (CA9 1985) (holding that remand was not necessary, even though findings did not articulate specific factual bases for holding, because the basis for the court's decision was clear); *see also* FED. R. CIV. P. 52(a).

Moreover, even if the Court were to decide that the findings in the per curiam opinion were somehow deficient, remand would not be necessary because "'the failure of a District Court to comply with Rule 52(a) in respect of findings of fact does not demand reversal of the correct judgment . . . if a full understanding of the issues could be reached without the aid of findings even though such findings would have been helpful.'" *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 400 (CA6 1997) (quoting *Urbain v. Knapp Bros. Mfg. Co.*, 217 F.2d 810, 815 (CA6 1954)). Because a full understanding of the issues is easily obtained from the opinion, the Court should not reverse and remand for additional factfindings in support of the lower court's judgment.

CONCLUSION

The Court should dismiss the portion of the appeal encompassing Appellant's §2 challenges to the LRB plan and otherwise summarily affirm the judgment of the three-judge court. SUP. CT. R. 18.12.

Respectfully submitted,

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In The

Supreme Court of the United States

MEXICAN AMERICAN LEGISLATIVE CAUCUS – TEXAS HOUSE OF REPRESENTATIVES,

Appellant,

v.

STATE OF TEXAS, et al.,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas (Three Judge Court)

REPLY TO MOTION TO DISMISS OR AFFIRM

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ARGUMENT

The State of Texas attempts to camouflage the deficiencies in the District Court judgment by mischaracterizing Appellant's challenge. The State of Texas argues in its Motion to Dismiss or Affirm that Appellant has challenged the State's redistricting plan, the LRB plan, not the plan adopted by the District Court. A review of the Appellant's Jurisdictional Statement clearly shows that the Appellant has appealed the District Court's judgment adopting a plan which is derived largely from the unprecleared LRB plan.[1]

The State further argues that because the State's adopted plan, the LRB plan, failed to secure preclearance it simply was not in effect, and therefore, could not have been subject to Section 2 review by the District Court. (Motion to Dismiss, pp. 2-5). On the other hand, the State also argues that it was appropriate for the District Court to employ the LRB plan as the baseline for its own plan since, except for minor retrogression problems, it was precleared. (Motion to Dismiss, p. 7, n. 13). Because, the District Court incorporated significant portions of the State's LRB plan as its own, Section 2 review of the LRB plan was appropriate.

As a matter of law, a legislative plan that has not secured preclearance is not 'effective as law' and a court must not address the validity of such a plan unless or

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[1] In the plan adopted by the District Court four of 150 districts are substantially modified from the LRB plan. The remaining districts in the court's plan are derived from the LRB plan virtually without change.

until the plan receives the requisite preclearance. *Conner v. Waller,* 421 U.S. 656 (1975) (*per curiam).* However, if a court incorporates the unprecleared plan as its own, it must ensure compliance with the substantive constitutional and statutory standards to which state plans are subject. *Upham v. Seamon,* 456 U.S. 37, 42 (1982) (*per curiam*). Therefore, once the District Court determined to use significant portions of LRB plan as its own, it was obligated to ensure compliance with Section 2 of the Voting Rights Act. The District Court's determination of Appellant's Section 2 challenge is not an advisory opinion and Appellant's Section 2 appeal is appropriate.

With regard to Appellant's Section 5 issues, Appellant does not challenge the portion of the District Court's plan that partially addressed the objections of the Department of Justice. (Districts 74, 38 and Bexar County). In fact, as to that portion of the District Court's plan Appellant has prevailed. However, because the District Court: (1) wholly neglected to address other portions of the letter of objection such as District 35 and South Texas generally; and because (2) the District Court adopted the State's suggested remedy[2] for District 35, without preclearance, the judgment of the District Court should be reviewed by this Court.

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[2] The State's suggested remedy was included in its post trial brief.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and set the case for argument.

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